Supreme Court, U.S.
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No. ——

In the Supreme Court of the United States

INDIAN RIVER ESTATES AND
DUANE J. TILLIMON,
Petitioners,

v.

PREFERRED PROPERTIES, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is it harmless error for the District Court to refuse to permit the Defendants in a civil jury trial to listen to the *voir dire* examination which is being conducted individually at the bench and out of the hearing of the parties after the Defendants objected?

2. Should the Court adopt a rule of *per se* prejudice where the District Court refuses to permit the Defendants in a civil jury trial to listen to the *voir dire* examination which is being conducted individually at the bench and out of the hearing of the parties?

3. Where the jury and the District Court erroneously decide a state law breach of contract issue in favor of a Plaintiff and decide a federal fair housing law issue in favor of a Plaintiff with a single compensatory verdict on damages, does the finding in favor of the Plaintiff on the federal law claim preclude the Court of Appeals from reviewing the claimed error in the state law claim?

4. May the District Court set a sale price based on an unexercised option in granting an injunction ordering sale of real estate, where the District Court erroneously submits the state law claim involving the option to the jury and the jury returns a single damage verdict on both the state law claim and the federal claim?

PARTIES TO THE PROCEEDING

Including the parties named in the caption of the Petition, the parties are:

Petitioners: Indian River Estates, Inc., an Ohio Corporation for profit, which develops real estate.
Duane J. Tillimon, an individual and principal of Indian River Estates, Inc.

Respondent: Preferred Properties, Inc., an Ohio not-for-profit Corporation, which is a non-profit housing agency that builds and manages rent subsidized apartments for low income families.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities v

Opinions Below 1

Jurisdiction 1

Relevant Provisions Involved 2

Statement of the Case 2

Reasons for Granting the Writ 4

As to First and Second Issue 4

Issues Three and Four 7

Conclusion 10

Appendix 1a

Appendix A - Sixth Circuit Order Denying Rehearing - 01/31/02 . . . . . 1a

Appendix B - Sixth Circuit Opinion - 01/09/02 . . . . . 3a

Appendix C - District Court Memorandum Opinion - 08/04/00 . . . . . 22a

Appendix D - District Court Judgment - 03/10/00 . . . . . 37a

Appendix E - Transcript Voir Dire - 02/29/00 . . . . . 39a

Appendix F - District Court Judgment Entry and Memorandum Opinion - 01/26/00 . . . . . 43a

Appendix G - Federal Rule of Civil Procedure 61 . . . . . 58a

TABLE OF AUTHORITIES

Atlantic Coast Line R. v. Tiller,
142 F.2d 718 (4th Cir. 1944) 8

Baltimore and Ohio R.C. v. Reeves,
10 F.2d 329 (6th Cir. 1926) 8

Chapman v. California, 386 U.S. 18 (1967) 6

Crestwell Ranch & Cattle Co. v. Martindale [8th Cir.],
63 F. 84 11 C.C.A. 39 9

Durant Mining Co. v. Percy Consolidated
Mining Co. [8th Cir.],
93 F. 166 35 C.C.A. 252 9

Hanson v. Parkside Surgery Center,
872 F.2d 745 (6th Cir. 1989) 6

Helminski v. Ayerst Labs, 766 F.2d 208 5

Kuykendall v. Southern Railroad Company,
652 F.2d 391, (4th Cir. 1981) 6

Lyons Potter & Co. v. First Nat. Bank of
Sioux City, [8th Cir.],
85 F. 120, 29 C.C.A. 45 9

St. Louis, Iron Mtn. & Southern Ry. Co. v.
Needham [8th Cir.],
63 F. 107, 11 C.C.A. 56, 25 L.R.A. 833 9

Stakes v. United States, 264 F. 18 8

State of Maryland v. Baldwin,
112 U.S. 490, 5 S.Ct. 278, 28 L.Ed. 822 9

United States v. Chatman,
584 F.2d 1358 (4th Cir. 1978) 6

What Cheer Coal Co. v. Johnson [8th Cir.],
56 F. 810, 6 C.C.A. 148 9

Wilmington Mining Co. v. Fulton,
205 U.S. 60 (1907) 8, 9

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

U.S. Constitution Fifth Amendment 6, 7

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1367 . . . . . 1, 2

42 U.S.C. §§ 3601-3631 (Fair Housing Act) 1,2

Federal Rules of Civil Procedure, Rule 61 . . . . . 2, 6

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Indian River Estates, Inc. and Duane J. Tillimon, Petitioners, by undersigned counsel, under appropriate rules of this Court, request that the Court issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

This is a dispute over the claimed acquisition of certain lots in the City of Toledo, Lucas County, Ohio. Respondent claimed a breach of contract under Ohio law and a violation of the federal Fair Housing law. 42 U.S.C. §3601-3631.

The District Court granted a preliminary Injunction and wrote an unpublished opinion. Therefore, the matter came on for trial by jury. The jury returned a verdict for the Respondent on both claims. The District Court denied Motions for New Trial and for Judgment as a Matter of Law in an unpublished opinion. Thereafter, the District Court granted a permanent injunction in an unpublished opinion.

On January 9, 2002 the Court of Appeals for the Sixth Circuit affirmed. 276 F.3d 790. On January 31, 2002 a Motion for Rehearing was denied.

JURISDICTION

Subject matter jurisdiction for the claims in the District Court were found in 42 U.S.C. §3601-3631 and 28 U.S.C. §1367.

Jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

Fair Housing Act 42 U.S.C. §3601-3631
Supplemental Jurisdiction 28 U.S.C. §1367
Federal Rules of Civil Procedure, 61

STATEMENT OF THE CASE

Preferred Properties, Inc., a non-profit corporation that provides rental housing for persons with disabilities contacted Duane J. Tillimon, President of Indian River Estates, Inc., a real estate developer, for the purpose of acquiring vacant lots in a subdivision owned by Indian River Estates, Inc. Preferred Properties, Inc. had applied to the U.S. Department of Housing and Urban Development for a grant to purchase 8 lots in the subdivision. In its application it indicated it would be acquiring additional lots for open market use. Indian River Estates claimed it had agreed to sell the 8 lots for subsidized housing plus 6 lots for open market housing, so as not to adversely impact the neighborhood with an all rent subsidized public housing project. A written option agreement was signed by the parties for the 8 lots. These were the lots for which HUD was providing financing and required a written option. The option expired on December 30, 1998 and was not exercised. Preferred Properties claims the option was extended verbally, but Indian River Estates denies the allegations and also maintains that such oral extensions are barred by the Ohio Statute of Frauds.

Indian River Estates thereafter refused to sell the 8 lots unless the other 6 lots were also purchased. The 6 lots were in between the 8 lots, alternating. Indian River Estates

claimed that if it sold only the 8 lots, it would have difficulties marketing the 6 in between lots because they would be in between rent subsidized public housing units. Preferred Properties maintained that Indian River Estates had refused to sell or negotiate for sale the 8 lots, in violation of the Federal Fair Housing Act.

When the case came on for jury trial, the District Court conducted an individual *voir dire* at the bench and out of the hearing of the parties. The lawyers, however, were present at the bench. Counsel for Petitioners objected to this procedure, but the objection was overruled. This issue was raised in the Motion for New Trial.

Both at the close of the Plaintiffs' case, and at the end, Defendants moved for judgment as a matter of law on the state breach of contract claims. Defendants argued that the option to purchase real estate had expired and that it was neither renewed nor extended by any writing, and that, therefore, there was no contract. The District Court denied all these motions and submitted this issue to the jury.

The jury returned a verdict on both the discrimination and breach of contract claims and awarded $31,500.00 in compensatory damages and $125,000.00 in punitive damages. The jury answered several interrogatories finding that, 1) Indian River Estates' refusal to sell or negotiate for the sale of the 8 lots was motivated by the fact that Preferred Properties' renters were disabled; 2) Indian River Estates' conduct was willful, wanton, or in reckless disregard of Preferred Properties' rights; and 3) the parties had agreed to extend the option contract to purchase the 8 lots.

After the jury verdict was returned, the District Court ordered the Petitioners to sell the 8 lots to the Respondent at the price contained in the unexercised option.

At the Sixth Circuit, the Court found that it was error for the District Court to exclude Petitioners from hearing the *voir dire*, but without giving any reason, found said error "harmless."

With regard to Petitioners' claims that the claim of extension of the option contract was barred by the Ohio Statute of Frauds, the Court found it to be a "very close state law question," but refused to resolve it because of the outcome of the fair housing claim.

A Petition for Rehearing was denied.

REASONS FOR GRANTING WRIT

AS TO FIRST AND SECOND ISSUE

The question raised in Issues One and Two, regarding the participation of the parties, is important. It involves a practice which the Court of Appeals has already found to be deprivation of the aggrieved parties' constitutional right to participate in each and every stage of the proceedings.

But by finding the error harmless, the Court of Appeals applies no sanction. It is impossible to show prejudice where a party is excluded from the *voir dire*. Thus, the District Court below, and any other federal district court will be free to continue employing the flawed practice or some variation without fear of reversal. Only by adopting a *per se* rule can this Court insure that this unfair practice be

abolished. This issue has never been before this Court before, although a Court of Appeals has addressed the issue. This Court should settle the issue.

Not only is the issue important to all future litigants in jury trials, but the technique which is allowed to continue without a *per se* rule is a departure from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

After ruling that excluding Petitioners from the *voir dire* due was a denial of his right to be present, the Court of Appeals held such error was harmless. The Court of Appeals suggested awkward and unwieldy alternatives allegedly available to counsel to attempt to cure the error. The alternatives were questioning the juror at the bench, informing the client of the answers and confirming strategy. This loses sight of the primary loss complained of by Petitioners – the right to observe and listen to the prospective juror and obtain impressions, which could then be conveyed to counsel. There is no alternative which could cure this impediment in the structure imposed by the District Judge. The Court of Appeals' "alternative" is as awkward as playing the cello in a marching band – moving your chair after each bar of music to catch up with the rest of the band members.[1]

The opportunity to participate in *voir dire* is recognized as a basic constitutional right. The case cited by the Court of Appeals so holds. Helminski v. Ayerst Labs, 766 F.2d 208, 213-14:

[1] See Take the Money and Run, a film by Woody Allen, where the anti-hero actually plays cello in a marching band.

> "A court may not exclude arbitrarily a party who desires to be present merely because he is represented by counsel; such exclusion would violate the due process clause of the Fifth Amendment."

This Court has held in Chapman v. California, 386 U.S. 18, 24 (1967) that:

> "Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

No such statement is contained in the opinion of the Court of Appeals, nor could it.

Rule 61 itself says that the court, "must disregard any error or defect which does not affect the substantial rights of the parties."

Where, as here, the Petitioners had a constitutional right under the Fifth Amendment of the U.S. Constitution to be present during the *voir dire* examination, his exclusion from such proceedings must be considered a "substantial right".

Courts have held that allowing an alternate juror to participate in deliberations is not harmless error. United States v. Chatman, 584 F.2d 1358 (4th Cir. 1978) and cases cited at page 1361. Kuykendall v. Southern Railroad Company, 652 F.2d 391, (4th Cir. 1981), Contra, Hanson v. Parkside Surgery Center, 872 F.2d 745 (6th Cir. 1989).

In fact, the Fourth Circuit in the cases cited above has proclaimed a *per se* rule on this issue. We urge this Court to adopt a *per se* rule where parties are effectively precluded from participating in *voir dire* selection by arbitrary court procedures.

The Court of Appeals at 798 comments that the Petitioners have not alleged any prejudice from the ruling. The very impossibility of showing prejudice should militate for the adoption of a *per se* rule. We cannot predict how our clients, the Petitioners, would have reacted to any of the jurors because they were precluded from hearing their examination. Only by adopting a *per se* rule can this Court insure that future litigants will be permitted by District Courts to enjoy their Fifth Amendment rights to participate in every stage of the proceedings.

ISSUES THREE AND FOUR

The Court of Appeals approved a single damage award based on two separate causes of action, one state and one federal. In doing so the Court of Appeals declined to rule on the propriety of the state law claim, which it found "very close." The Court of Appeals used a variation of the discredited (in federal court) two-issue rule. It is important that Courts of Appeals be required to rule on crucial issues that a jury was allowed to consider in arriving at its single, unsegregated jury verdict. This is an important question of appellate review deserving of this Court's attention. If not corrected, the appellate review by Courts of Appeals will remain tainted. Serious litigants deserve full, not piecemeal, appellate review. Only this Court can promulgate and enforce a proper rule for Courts of Appeals.

The jury answered interrogatories finding for the Respondent on both the federal fair housing claim and the state law breach of contract claim. However, it returned a general damage verdict.

The Court of Appeals, although finding the resolution of the state law claim to be very close, declined to review it because of the finding in Respondent's favor on the fair housing claim.

The so-called two-issue rule has been applied by some states where a general verdict has been returned upon two or more issues. Strictly speaking, the two-issue rule has no application where the jury makes specific finding of liability as to both issues. However, here, the damage verdict was general with no allocation to one issue or the other.

To the extent that the Court of Appeals analyzed its holding to the two-issue rule, it was in error. The two-issue rule is not applied in federal court. Such is the rule in Wilmington Mining Co. v. Fulton, 205 U.S. 60 (1907). The Sixth Circuit has held that "if there was substantial error as to submitting any of the other theories, the verdict cannot stand. This is established in federal law." Baltimore and Ohio R.C. v. Reeves, 10 F.2d 329, 330-331 (6th Cir. 1926).

Also rejecting the two-issue rule in federal court is Atlantic Coast Line R. v. Tiller, 142 F.2d 718 (4th Cir. 1944); citing Stakes v. United States, 264 F. 18, 23, as follows:

> "* * * A general verdict under an erroneous instruction cannot be upheld, when there were two theories submitted to the jury, on either of which they might have founded it, under one of which the instruction was harmless, while

> under the other it was error, because the generality of the verdict renders it impossible to determine upon which theory the jury based it. They may have founded it upon the very issue to which the erroneous instruction related, and that instruction may have controlled and produced their finding. State of Maryland v. Baldwin, 112 U.S. 490, 493, 5 S.Ct. 278, 28 L.Ed. 822; Lyons Potter & Co. v. First Nat. Bank of Sioux City, [8th Cir.], 85 F. 120, 123, 29 C.C.A. 45, 48; Durant Mining Co. v. Percy Consolidated Mining Co. [8th Cir.], 93 F. 166, 169, 35 C.C.A. 252, 255; St. Louis, Iron Mtn. & Southern Ry. Co. v. Needham [8th Cir.], 63 F. 107, 114, 11 C.C.A. 56, 63, 25 L.R.A. 833; What Cheer Coal Co. v. Johnson [8th Cir.], 56 F. 810, 813, 6 C.C.A. 148, 151; Crestwell Ranch & Cattle Co. v. Martindale [8th Cir.], 63 F. 84, 90, 11 C.C.A. 33, 39." See also Wilmington Star Mining Co. v. Fulton, 205 U.S. 60, 27 S.Ct. 412, 51 L.Ed. 708.

The Court of Appeals, in declining to rule on the propriety of submitting the state law breach of contract issue to the jury, failed to note that there was a single damage verdict for two quite different causes of action, each of which had separate elements of damage. So, although this is not a traditional two-issue case, the Court of Appeals holding should be challenged because of the single damage verdict.

In addition, when the District Court turned to the issue of the mandatory injunction requiring Petitioners to deed the property to the Respondent, it employed the lot prices contained in the unexercised option agreement and refused to

hold a hearing on the price, because the jury had found a breach of the option contract. Without such a finding there would be no basis for the price required by the option contract when the injunction was issued.

Finally, the District Court submitted to the jury the issue of punitive damages. It is hard to imagine that in assessing punitive damages the jury blocked from its consciousness its finding that Petitioners were contract breakers.

CONCLUSION

THEREFORE, Petitioners Indian River Estates, Inc. and Duane J. Tillimon request of this Court that it **GRANT** its Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

RESPECTFULLY SUBMITTED,

BRITZ AND ZEMMELMAN
Harland M. Britz
Counsel of Record

Attorney for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 00-4088

[Filed January 31, 2002]

PREFERRED PROPERTIES, INC.,
Plaintiff-Appellee,

v.

INDIAN RIVER ESTATES, INC.;
DUANE TILLIMON
Defendants-Appellants.

Before:
KENNEDY, MOORE and
COLE, Circuit Judges.

ORDER

Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/ _____
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 00-4088

[Filed January 9, 2002]

PREFERRED PROPERTIES, INC.,
Plaintiff-Appellee,

v.

INDIAN RIVER ESTATES, INC.;
DUANE J. TILLIMON
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO AT TOLEDO
No. 99-07342
David A. Katz, District Judge

JUDGES:
KENNEDY, MOORE and COLE, Circuit Judges.

OPINION

KAREN NELSON MOORE, Circuit Judge. This case involves a dispute over an option contract to purchase undeveloped residential property in Toledo, Ohio, for the construction of rental housing for persons with disabilities. At trial, the jury returned a verdict for Preferred Properties, Inc. ("Preferred Properties") on its claims that Indian River Estates, Inc. ("Indian River Estates") and Duane J. Tillimon ("Tillimon") had 1) violated the Fair Housing Act ("FHA"), 42 U.S.C. §§3601-3631, and Ohio's Civil Rights Act by refusing to sell property based upon the disabilities of future residents and 2) breached the option contract. Indian River Estates and Tillimon now appeal the district court's denial of their motions for a judgment as a matter of law and for a new trial and its grant of summary judgment to Preferred Properties on their counterclaim of abuse of process. We **AFFIRM** the district court's decision to deny the defendants' motions, on the ground that the defendants violated the FHA. We also **AFFIRM** the district court's decision to grant summary judgment on the defendants' counterclaim.

I. BACKGROUND

Preferred Properties is a non-profit corporation that owns and operates rental housing for persons with disabilities in Toledo, Ohio. Tillimon, the president of Indian River Estates, develops residential property in Toledo; Indian River Estates is a twenty-three lot subdivision in the Point Place area of Toledo. Since 1992, Preferred Properties has developed more than fifty affordable housing units for persons with disabilities. In 1995, Preferred Properties became interested in the Indian River Estates subdivision while

searching for sites on which to base an application to the Section 811 program of the United States Department of Housing and Urban Development ("HUD"), which supports housing for persons with disabilities.

On July 25, 1997, Lewis S. Ellis ("Ellis"), executive director of Preferred Properties, executed an option contract to purchase eight specific, noncontinguous lots in the Indian River Estates subdivision.[1] The option was to expire on December 30, 1997, but Preferred Properties could extend the option through December 30, 1998, by depositing $ 1,000 for each of the eight lots before December 30, 1997. On July 28, 1997, Preferred Properties applied to HUD for funding to construct handicapped-accessible housing units in the Indian River Estates subdivision. The application proposed "to develop 8 lots for 15 dwelling units" and stated that "[a] private developer will develop open market duplexes for middle income residents on alternate lots to the proposed Section 811 units," so that Indian River Estates would "be an integrated community by income, racial mix and disability." Joint Appendix ("J.A.") at 382.

On November 14, 1997, Preferred Properties received notification from HUD that its application had been approved and that $ 1,037,000 had been reserved for the project. On February 24, 1998, Preferred Properties paid the defendants $ 8,000 in earnest money for the purchase of the eight lots in

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[1] The crux of the parties' dispute is whether Ellis agreed to purchase eight lots, which constituted every other lot along the south and east sides of the Indian River Estates subdivision, or eight lots plus the six lots that were in-between them.

the Indian River Estates subdivision.[2] However, Tillimon had difficulty securing financing and city approval, which meant that necessary improvements to the Indian River Estates subdivision were not completed by the end of 1998 and thus precluded any purchase of the lots. The parties dispute whether the option, which was set to expire on December 30, 1998, was extended by oral agreement.

On March 17, 1999, Ellis prepared and sent to Tillimon a revised option agreement for the eight lots. On April 1, 1999, Tillimon proposed that the parties "sign a straight purchase contract," because Indian River Estates would soon begin construction, having obtained the requisite city approval and financing. J.A. at 19. With that letter, Tillimon forwarded two purchase contracts -- one for eight lots and one for the six in-between lots, which he deemed unmarketable due to discrimination against persons with disabilities. Ellis signed and returned the purchase contract for the eight lots.

On May 7, 1999, Tillimon returned Preferred Properties' $ 8,000 deposit without any explanation. The next day, he wrote Preferred Properties a letter in which he questioned whether Preferred Properties was still "interested in purchasing the fourteen lots as previously agreed because of the unlikelihood that anyone would rent the 'in between' twinplexes on the open market." J.A. at 21. Tillimon claimed

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[2] The original option contract required Preferred Properties to forward the earnest money by December 30, 1997. Ellis testified at trial that he talked with Tillimon at the end of 1997 and received his consent to payment after January 1, 1998. Tillimon accepted the $ 8,000 check that Preferred Properties sent on February 24, 1998.

to have received "numerous telephone calls from neighbors protesting the development" and expressed amazement at the "tremendous community opposition to handicapped housing in Toledo." J.A. at 21. He also stated that he had been sued for constructing handicapped-accessible housing elsewhere in Toledo.

On May 17, 1999, Ellis returned the $ 8,000 check and requested completion of the sale of the eight lots. He also noted, "While we wish to explore the feasibility of purchasing an additional six lots, these lots are not part of our option contract and would constitute a separate purchase." J.A. at 24. In a letter dated May 21, 1999, Tillimon responded by stating that Preferred Properties' option had expired on December 30, 1998, and that he would not sell scattered lots in the Indian River Estates subdivision. Tillimon also claimed that community opposition to handicapped-accessible housing was too strong to be borne:

> The cost of defending [against lawsuits filed by citizens] is devastating to any builder or developer and [his] subdivisions obtain a stigma making them unmarketable to the ordinary citizen. Perhaps, some day in the future things will be different, but we do not want to pay the price for a social experiment that the community opposes.

J.A. at 27.

On June 2, 1999, Preferred Properties filed a complaint against Indian River Estates and Tillimon, alleging that the defendants had 1) violated the FHA and Ohio's Civil

Rights Act by refusing to sell property based upon the disabilities of future residents and 2) breached the agreement to sell Preferred Properties the eight lots specified in the option contract. Preferred Properties sought 1) declaratory relief, 2) preliminary and permanent injunctive relief, 3) specific performance of the option contract, 4) compensatory and punitive damages, and 5) attorney's fees and costs. Preferred Properties also filed a motion for a temporary restraining order ("TRO") that would preclude the defendants from selling the eight lots to third parties.

The district court granted Preferred Properties' motions for a TRO and a preliminary injunction. On July 30, 1999, the defendants filed an answer and counterclaim, alleging that Preferred Properties 1) had made false representations that it intended to acquire fourteen lots in the Indian River Estates subdivision and 2) was "employing federal anti-discrimination laws in an effort to correct its own error in failing to exercise the option herein within the option period." J.A. at 77. On December 16, 1999, Preferred Properties filed a motion for summary judgment on the defendants' counterclaim and for partial summary judgment as to liability. On January 26, 2000, the district court granted the first but not the second motion.

On February 29, 2000, the case proceeded to a trial by jury. On March 2, 2000, the jury returned a verdict for Preferred Properties on both the discrimination and breach of contract claims and awarded $ 31,500 in compensatory damages and $ 125,000 in punitive damages.[3] The jury also

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[3] The district court later awarded $81,579.96 in attorney's fees and expenses to Preferred Properties.

answered several interrogatories, specifically finding that 1) Indian River Estates' refusal to sell or to negotiate for the sale of the eight lots was motived by the fact that Preferred Properties' renters are disabled, 2) Indian River Estates' conduct was willful, wanton, or in reckless disregard of Preferred Properties' rights, and 3) the parties had agreed to extend the option contract to purchase the eight lots.

On March 10, 2000, Preferred Properties filed a motion for a permanent injunction against further discrimination and for specific performance of the option contract. On March 20, 2000, the defendants moved for a judgment as a matter of law and for a new trial. On August 4, 2000, the district court denied the defendants' motions. On August 24, 2000, the defendants filed a notice of appeal. On October 11, 2000, the district court granted Preferred Properties' motion for a permanent injunction and for specific performance.[4]

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[4] The defendants' notice of appeal, which was filed before the district court granted Preferred Properties' motion for a permanent injunction and for specific performance, may have been premature. *Cf. Harolds Stores, Inc. v. Dillard Dep't Stores, Inc.*, 82 F.3d 1533, 1542 (10th Cir.) (holding that the district court's "order denying [the defendant's] renewal motion for judgment as a matter of law did not become an appealable final decision under 28 U.S.C. §1291 until the district court denied [the plaintiff's] claim for a permanent injunction"), *cert. denied*, 519 U.S. 928, 136 L. Ed. 2d 216, 117 S. Ct. 297 (1996).

However, we have previously stated that a premature notice of appeal is effective to vest appellate jurisdiction when the judgment becomes final prior to the disposition of the appeal. *Good v. Ohio Edison Co.*, 104 F.3d 93, 96 (6th Cir. 1997) (citing *Gillis v. U.S. Dep't of Health and Human Servs.*, 759 F.2d 565, 569 (6th Cir. 1985)); *see also Jackson v. TVA*, 595 F.2d 1120, 1121 (6th Cir. 1979) (indicating that "an appeal should not be dismissed

II. ANALYSIS

A. Exclusion from Voir Dire

Tillimon first argues that the district court violated his constitutional rights by conducting at least part of the voir dire outside of his hearing. The record as it stands indicates that the district court began the voir dire in open court and then examined individual prospective jurors at the bench, thereby excluding Tillimon. During such a sidebar discussion, defense counsel raised an objection, observing that Tillimon felt "left out by not being able to participate at this level." J.A. at 177. The district court explained that he had "never had the client up here." J.A. at 178. The lawyer for Tillimon then noted an objection.

In *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 63 L. Ed. 853, 39 S. Ct. 435 (1919), the Supreme Court recognized the right of a civil litigant to be present in some capacity during the trial of his case: "We entertain no doubt that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict." *Id.* at 81. *Fillippon* thus left open the question of a party's right to be

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because it was technically premature if in fact an appealable judgment or order was rendered below, the appellant clearly manifested his intent to appeal from it and the prevailing party below can show no prejudice resulting from the prematurity of the notice") (quoting 9 James Wm. Moore, Moore's Federal Practice ¶ 204.14, at 983 (2d ed. 1975)).

present personally. *See Helminski v. Ayerst Labs.*, 766 F.2d 208, 213 (6th Cir.) ("Consistent with due process the right to be present may be sufficiently protected in the party's absence so long as the litigant is represented by counsel."), *cert. denied*, 474 U.S. 981, 88 L. Ed. 2d 339, 106 S. Ct. 386 (1985). Appreciating the importance of the personal presence of a party, we concluded in *Helminski* that the "arbitrary exclusion" of a represented party "who wishes to be personally present in the courtroom" during the trial would violate the Due Process Clause of the Fifth Amendment. *Id.* at 213-14. Exclusions would comport with due process, however, if a litigant were unable to "comprehend the proceedings and aid counsel," engaged in "disruptive behavior," or gave "a knowing and voluntary waiver." *Id.* at 216-17.

Under *Fillippon* and *Helminski*, then, there is no doubt that a civil litigant has the right to be present in person "at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict." *Fillippon,* 250 U.S. at 81. The question before us is whether this right extends to the voir dire. According to Black's Law Dictionary (6th ed. 1990), the word "impanel" may be defined quite narrowly, as "the act of the clerk of the court in making up a list of the jurors who have been selected for the trial of a particular cause," or more broadly, to include "all the steps of ascertaining who shall be the proper jurors to sit in the trial of a particular case up to the final formation." *Id.* at 752. We note that the selection of a jury has important consequences for the trial, and that parties "can often be helpful in noticing or pointing out things about certain jurors that their lawyers might not or could not see." *United States v. Gibbs,* 182 F.3d 408, 438 (6th Cir.), *cert. denied*, 528 U.S. 1051, 145 L. Ed.

2d 492, 120 S. Ct. 592 (1999). We accordingly adopt the broader definition of "impanel" and hold that civil parties have the right to be present in person during the voir dire absent compelling reasons, which a district court must establish on the record so as to be reviewable on appeal. The exclusion of litigants will be reviewed under a harmless error standard. *Cf. id.* at 437.

In this case, the district court did not give a valid reason on the record for excluding Tillimon from the individual examinations of prospective jurors at the bench. However, Tillimon has not alleged any prejudice resulting from his absence that would warrant reversal. Although he argues on appeal that his exclusion prevented him from personally gaining an impression of the prospective jurors and making suggestions to defense counsel in the exercise of his peremptory challenges, we note that defense counsel could have questioned the jurors at the bench, informed Tillimon about their answers, conferred about strategy, and then moved to strike those jurors whom Tillimon wanted to remove. Tillimon's exclusion from the sidebar discussions did not completely foreclose his participation in the actual exercise of his peremptory challenges. Therefore, we hold that the district court erred in excluding Tillimon from part of the voir dire but that, in this case, the error was harmless.

B. Fair Housing Act Claim

The defendants contend that they are entitled to a new trial on the discrimination claim because the jury instructions required proof by a preponderance of the evidence that Preferred Properties was ready, willing, and able to purchase the property at issue and a reasonable jury could not have

found that Preferred Properties was such a buyer. We review the grant or denial of a new trial for an abuse of discretion, "defined as a definite and firm conviction that the trial court committed a clear error of judgment." *Monette v. AM-7-7 Baking Co.*, 929 F.2d 276, 280 (6th Cir. 1991).

At trial, Preferred Properties introduced as Plaintiff's Exhibit 2 a letter from HUD that notified Preferred Properties of its selection for $ 1,037,000 in reserved funds. The HUD letter stipulated:

> The Fund Reservation will be canceled if the Sponsor/Owner fails to have control of an approvable site within 6 months of the date of this Notification or if construction, rehabilitation or acquisition from the RTC has not commenced within 18 months from the date of this Notification, unless further extensions beyond the 18 months are approved by HUD. Such extensions will be based upon HUD's determination that the Owner has established a reasonable schedule and is making sufficient progress toward the start of construction.

J.A. at 309. The letter appears to be dated October 14, 1997; it is marked as received on November 14, 1997. The defendants argue that the fund reservation, which neither committed nor allocated funds in actuality, was canceled because Preferred Properties failed to meet HUD's conditions. Such a cancellation would preclude a jury from finding that Preferred Properties met its burden of proof. However, Ellis testified at trial that HUD had approved an

extension of the fund reservation.[5] In light of this evidence, we are not persuaded that the district court committed a clear error of judgment in denying the defendants' motion for a new trial.

The defendants also challenge the jury's $ 125,000 punitive damages award to Preferred Properties, claiming that their refusal to sell was based on a good-faith belief that Preferred Properties had optioned all fourteen lots rather than any evil motive or intent on their part. This issue was presented in the defendants' motion for a judgment as a matter of law, which the district court denied. We review de novo the denial of a motion for a judgment as a matter of law. *Gray v. Toshiba Am. Consumer Prods., Inc.*, 263 F.3d 595, 598 (6th Cir. 2001). Such a motion may be granted "only when there is a complete absence of fact to support the verdict, so that no reasonable juror could have found for the nonmoving party." *EEOC v. Harbert-Yeargin, Inc.*, 266 F.3d

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[5] On appeal, the defendants contend that this evidence was inadmissible hearsay. However, as Preferred Properties notes, defense counsel did not raise an objection at trial. We therefore review the admission of this evidence for plain error. *United States v. Fortson*, 194 F.3d 730, 736 (6th Cir. 1999).

Preferred Properties claims that Ellis's conversation with the HUD official who approved the extension of the grant was not inadmissible hearsay because it was offered as a verbal act and not for the purpose of proving the truth of the matter asserted. The verbal acts doctrine applies where "legal consequences flow from the fact that words were said, *e.g.* the words of offer and acceptance which create a contract." Black's Law Dictionary, *supra*, at 1558; *see also* 2 John W. Strong, McCormick on Evidence §249, at 100-01 (5th ed. 1999). Because the question of whether HUD's extension of the grant was an offer is a close one, we conclude that the district court did not commit plain error.

498, 504 (6th Cir. 2001) (quoting *Moore v. KUKA Welding Sys. & Robot Corp.*, 171 F.3d 1073, 1078 (6th Cir. 1999)). "We do not weigh the evidence, evaluate the credibility of the witnesses, or substitute our judgment for that of the jury." *Id.* at 510 (quoting *Black v. Zaring Homes, Inc.*, 104 F.3d 822, 825 (6th Cir.), *cert. denied*, 522 U.S. 865, 139 L. Ed. 2d 114, 118 S. Ct. 172 (1997)). Instead, we view "the evidence in the light most favorable to the nonmoving party and decide if it was sufficient to raise a genuine issue of material fact for the jury." *Id.* We will thus affirm the jury's verdict unless we are "left with the definite and firm conviction that a mistake resulting in plain injustice has been committed, or unless the verdict is contrary to all reason." *Id.* at 504 (quoting *Schoonover v. Consol. Freightways Corp. of Del. Local 24*, 147 F.3d 492, 494 (6th Cir. 1998) (quotation omitted), *cert. denied*, 525 U.S. 1140, 143 L. Ed. 2d 39, 119 S. Ct. 1029 (1999)).

The FHA provides that victims of discriminatory housing practices may recover actual and punitive damages. 42 U.S.C. §3613(c)(1). The standard for punitive damages in a federal civil rights action is based on the defendant's state of mind and does not require egregious or outrageous behavior. *See Smith v. Wade*, 461 U.S. 30, 56, 75 L. Ed. 2d 632, 103 S. Ct. 1625 (1983) (holding that a jury may award punitive damages in a §1983 action "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others"). In *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 144 L. Ed. 2d 494, 119 S. Ct. 2118 (1999), a Title VII employment discrimination case, the Supreme Court expressly rejected the argument that a defendant's conduct must be egregious to support a punitive

damages award. *Id.* at 535 ("The terms 'malice' or 'reckless indifference' pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination."). However, the *Kolstad* Court held that "an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages." *Id.* at 536. Employers who are simply "unaware of the relevant federal prohibition" or believe that the discrimination is lawful are not subject to punitive damages liability. *Id.* at 536-37.

We have not yet addressed whether the *Kolstad* standard for punitive damages is applicable in the context of the FHA, but two circuits have determined that it is. *Badami v. Flood*, 214 F.3d 994, 997 (8th Cir. 2000); *Alexander v. Riga*, 208 F.3d 419, 430-32 (3d Cir. 2000), *cert. denied*, 531 U.S. 1069, 148 L. Ed. 2d 660, 121 S. Ct. 757 (2001).[6] In *Alexander*, the Third Circuit reversed the district court's denial of the plaintiffs' request to submit the issue of punitive damages to the jury. *Alexander*, 208 F.3d at 435. After the liability and compensatory and/or nominal damages phase of the trial, the jury had returned a special verdict finding that the plaintiffs' rights under the FHA had been violated by the owner and manager of an apartment building who repeatedly refused to deal with African-Americans but just as consistently responded to the inquiries of white individuals. *Id.* at 424-25. Because the jury did not award compensatory

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[6] As Preferred Properties notes, a finding of malice is not required before punitive damages may be awarded against a party who engages in housing discrimination in violation of Ohio law. *Shoenfelt v. Ohio Civil Rights Comm'n*, 105 Ohio App. 3d 379, 663 N.E.2d 1353, 1355-56 (Ohio Ct. App. 1995).

damages, the district court declined to send the issue of punitive damages to the jury, on the grounds 1) that the jury apparently did not believe that the defendant was liable under *Smith* and 2) that a punitive damages award required "more than intentional discrimination." *Id.* at 431. Citing *Kolstad*, the *Alexander* court held that the jury's finding of a FHA violation, which "necessarily encompasses a finding of intentional discrimination," meant that the plaintiffs could receive punitive damages without "demonstrating that the conduct was particularly egregious or malicious." *Id.*

We also conclude that a jury may award punitive damages for violations of the FHA, even if the defendant did not engage in egregious misconduct. Like 42 U.S.C. §1981a, which was at issue in *Kolstad*, 42 U.S.C. §3604 "does not require a showing of egregious or outrageous discrimination independent of the [defendant's] state of mind." *Kolstad*, 527 U.S. at 535. The FHA prohibits discriminatory housing practices, 42 U.S.C. §3613(a)(1)(A), against persons with disabilities or those associated with such persons. *Id.* §3604(f)(1). Relief for discriminatory housing practices requires only that a seller be engaged in unlawful discrimination.

Under *Smith* and *Kolstad*, the question for the availability of punitive damages is whether "the defendants acted with malice or reckless indifference that their actions might violate a federal statute of which they were aware." *Badami*, 214 F.3d at 998. In addition, we have previously indicated that the purpose of a punitive damages award is to deter future wrongdoing as well as to punish wrongdoers. *Barnier v. Szentmiklosi*, 810 F.2d 594, 598 (6th Cir. 1987). Because discrimination has harmful consequences no matter

what its form, the goals of deterrence would be ill served if punitive damages attached only to outrageous discrimination.

In this case, the jury returned a special verdict finding that the defendants' conduct was "willful, wanton, or in reckless disregard" of the rights of Preferred Properties. J.A. at 122. Because we defer to the jury's judgment on factual matters, we conclude that the defendants' good-faith argument lacks merit. Furthermore, the jury could reasonably infer from the evidence presented at trial that Tillimon knew or perceived the risk that his actions violated federal law. Tillimon has been involved in the real estate industry for more than twenty years, during which time he has rented property to persons with disabilities. These facts suggest that Tillimon had the requisite knowledge to be held liable for punitive damages and are sufficient to support the verdict.

C. Breach of Contract Claim

The defendants contend that no reasonable juror could have found that the parties agreed to extend the option. They also argue that any verbal extension of the option after the expiration date of December 30, 1998, was barred by Ohio's Statute of Frauds. Our review of Ohio caselaw raises some doubt about the validity of verbal extensions of option contracts. *Compare Hassel v. Gaydos*, 3 Ohio Law Abs. 43, 1924 WL 2076, at *1 (Ohio Ct. App. 1924) (holding that a verbal extension of time on a written option to sell land was unenforceable under the Statute of Frauds), with *Reckart v. Lyons*, 1993 Ohio App. LEXIS 3933, No. 92- L-180, 1993 WL 317447, at *2 (Ohio Ct. App. Aug. 13, 1993) (holding that there was no material issue of fact as to whether there was an oral modification to a lease/option agreement because

the agreement specifically required any modifications to be in writing); *cf. Clark v. Guest*, 54 Ohio St. 298, 43 N.E. 862, 863 (Ohio 1896) (holding that a verbal extension of time on a contract for the sale of lumber was void). However, given the outcome of the FHA claim, we decline to resolve the very close state law question of whether the option contract was extended in compliance with the Statute of Frauds.

D. Grant of Summary Judgment to Preferred Properties on Indian River Estates' Counterclaim

Finally, Indian River Estates argues that the district court erred in granting summary judgment to Preferred Properties on Indian River Estates' counterclaim, which alleged that Preferred Properties had claimed discrimination to force the sale of the eight lots after the option expired.[7] We review de novo a district court's grant of a motion for summary judgment. *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1048 (6th Cir. 2001). Summary judgment is appropriate when the record "shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). No genuine issue of material fact exists "unless a reasonable jury could return a verdict for the nonmoving party." *Cockrel*, 270 F.3d at 1048. In reviewing a grant of summary judgment, we view the evidence in the light most favorable to the nonmoving party. *Id.*

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[7] The counterclaim also alleged that Preferred Properties had falsely represented that it intended to acquire fourteen lots in the Indian River Estates subdivision. Indian River Estates appears to have dropped this argument on appeal.

The district court did not address this aspect of Indian River Estates' counterclaim in its otherwise detailed memorandum opinion. Although Indian River Estates does not term it as such, its counterclaim is a tort claim for abuse of process. To establish such a claim, a plaintiff must prove the following: "(1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process." *Robb v. Chagrin Lagoons Yacht Club, Inc.*, 75 Ohio St. 3d 264, 662 N.E.2d 9, 14 (Ohio 1996) (quoting *Yaklevich v. Kemp, Schaeffer & Rowe Co.*, 68 Ohio St. 3d 294, 626 N.E.2d 115, 118 (Ohio 1994)). In *Robb*, the Ohio Supreme Court stated that abuse of process "connotes the use of process properly initiated for improper purposes." *Id.* (quoting *Clermont Envtl. Reclamation Co. v. Hancock*, 16 Ohio App. 3d 9, 474 N.E.2d 357, 362 (Ohio Ct. App. 1984)). The *Robb* Court also noted:

> In an abuse of process case, "[t]he improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club." Prosser & Keeton on Torts (5 Ed. 1984) 898, Section 121. Simply, abuse of process occurs where someone attempts to achieve through use of the court that which the court is itself powerless to order.

Id. In this case, Indian River Estates alleges that Preferred Properties "schemed to exonerate [its] own negligence by charging handicap discrimination." Appellants' Br. at 25. The charge of negligence apparently relates to the expiration of the written option on December 30, 1998. However, the surrender of property was properly involved in this case as a remedy for Indian River Estates' alleged violation of the FHA, which authorizes courts to order "such affirmative action as may be appropriate." 42 U.S.C. §3613(c)(1); *see also Moore v. Townsend*, 525 F.2d 482, 485 (7th Cir. 1975) (explaining that "it matters not whether there was a specific contract or not; otherwise the very purpose of the [FHA] would be completely frustrated"). Because the district court was empowered to order specific performance, we conclude that no abuse of process occurred.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:99 CV 7342

[Filed August 4, 2000]

PREFERRED PROPERTIES, INC., Plaintiff,	)
v.	)
INDIAN RIVER ESTATES, INC., et al., Defendant.	)

MEMORANDUM OPINION

KATZ, J.

This action was brought under the Fair Housing Act and the parallel state statute based upon the Defendants' refusal to sell eight non-contiguous lots to be developed for handicapped housing. These claims were tried to a jury commencing February 29, 2000. On March 3, 2000, the jury, via special interrogatories, found that: (1) Defendants' conduct was a motivating factor in their refusal to sell or negotiate for the sale of eight non-contiguous lots; (2) the conduct of the respective Defendants was willful, wanton or

in reckless disregard; and (3) the parties agreed to extend or waive the expiration date of the option contract. The jury also awarded compensatory and punitive damages totaling $156,500. This matter is now before the Court on Defendants' Motion for Judgment as a Matter of Law and for a New Trial. Also before the Court is Plaintiff's Opposition and Defendants' Reply thereto. This Court has jurisdiction pursuant to 28 U.S.C. §1331.

MOTION FOR JUDGMENT AS A MATTER OF LAW

A. Standard

The first issue the Court must decide is whether Defendants are entitled to judgment as a matter of law, notwithstanding the jury verdict. The issue raised by a motion for judgment as a matter of law is whether a reasonable juror, relying on the evidence put forth at trial, could find for the plaintiffs on each of the elements of their claim. In making that determination, the Court may neither weigh the evidence nor pass on the credibility of witnesses, and must make all reasonable inferences in favor of the nonmoving party. *Buntin v. Breathitt County Bd. of Educ.*, 134 F.3d 796, 798-88 (6th Cir. 1998); *Monday v. Oullette,* 118 F.3d 1099, 1101-02 (6th Cir. 1997). *Smelser v. Norfolk S. Ry. Co.,* 105 F.3d 299, 306 (6th Cir.), *cert. denied,* 522 U.S. 817, 118 S. Ct. 67, 139 L. Ed. 2d 29 (1997).

B. Extension of the Option Contract

Defendants seek judgment as a matter of law on the issue of the extension of the option contract. It is their contention that the law of Ohio does not allow such

agreements to be extended orally.

Ohio has codified the Statue of Frauds in Ohio Rev. Code §1335.04 as follows:

> No lease, estate, or interest, either in freehold or term of years, or any uncertain interest of, in, or out of lands, tenements, or hereditaments, shall be assigned or granted except by deed, or note in writing, signed by the party assigning or granting it, or his agent thereunto lawfully authorized, by writing, or by act and operation of law.

"[A]s a general matter, modifications to agreements within the Statute of Frauds must also be in writing." *Columbia Gas Transmission Corp. v. Ogle,* 51 F.Supp.2d 866, 874 (1997), citing *Adams v. Samuels,* 82 Ohio App. 102, 75 N.E.2d 493 (1947); *Clark v. Guest,* 54 Ohio St. 298, 43 N.E. 862 (1896). However, there is implied authority for the proposition that an option contract may be extended orally, *Reckart v. Lyons,* Case No. 92-L-180, 1993 WL 317447 (1993) (because the option agreement expressly required an extension of the terms to be written, evidence of an oral agreement did not serve to modify the original terms) or that a party's actions may constitute waiver of the agreement. *See Ritchie v. Cordray,* 10 Ohio App.3d 213,215,461 N.E.2d 325 (1983) (in an option contract the offeree must strictly comply with the terms but such strict compliance may be waived by the offeror).

At trial, Lew Ellis ("Ellis"), Plaintiff's Director,

testified that he discussed the issue of extending the option contract with Defendant's Principal in late 1998. Ellis also testified that he believed there was an agreement to extend the option contract. Under the terms of the option contract (p. 2, ¶ 2 of the Agreement), the Seller had not yet completed the required improvements to the subject properties as required in the option contract. Based upon that understanding, in March 1999 Ellis forwarded a real estate option contract relative to the original 8 non-contiguous lots which stated that the option was in effect until December 30, 1999. (Pltf's Ex. 10.) Subsequently, on April 1, 1999, Defendants sent two separate purchase contracts to Plaintiff, one for the odd numbered lots (original 8 non-contiguous lots) and another for the six even numbered, additional lots, with the following message:

> The option agreement you mailed me had the old lot numbers, but since all approvals have been met and we are starting construction, we can sign a straight purchase contract at this point. I am sending a plat drawing with the new lot numbers. The city required me to dedicate more right-of-way so I lost one lot on the north side of the street which changed the lot numbers by one digit. Old lot eleven became new lot ten, and so on.
>
> I have prepared two separate contracts. The first is for the lots to be purchased under your federal grant. The second is for the lots to be purchased by you privately. I will transfer the $8000.00 option consideration to the first contract as earnest money, but I need

> $6000.00 earnest money for the second contract.

(Pltf's Ex. 3.)

Upon the consideration of this evidence, including the testimony of Mr. Tillimon, who denied that he agreed to extend the option agreement, the jury agreed that the parties had extended or waived the expiration date of December 30, 1998.

"Parties to an executory contract can modify that contract as they wish, and their mutual waiver of rights under the contract is sufficient consideration for the change." *Castrucci v. Young,* 33 Ohio Misc.2d 41, 46, 515 N.E.2d 658, 664 (1986), citing *Phelps v. Logan Natural Gas & Fuel Co.,* 101 Ohio St. 144, 128 N.E. 58 (1920). In this instance, the option contract did not require an extension or other modification to be in writing. *Compare, 715 Spencer Corp. v. City Envtl. Servs. Inc.,* 80 F.Supp.2d 755,761 (N.D. Ohio 1999) (court rejected argument that option had been exercised orally where the option agreement expressly required exercise of that option to be in writing); *Reckart v. Lyons,* 1993 WL 317447 *2 (appellate court agreed that in light of an express requirement in the lease agreement requiring modifications to be in writing, arguments relative to an oral modification of that agreement were of no consequence). In the present action, the jury was apparently convinced by the evidence that the parties had agreed to extend the option agreement beyond the December 30, 1998 date. This is evident from their answer to the following question in the affirmative:

> Do you find by a preponderance of the

> evidence that the parties agreed to extend the Option Agreement beyond December 30, 1998; or expressly waived the expiration date of December 30, 1998?

The cases upon which Defendant relies are distinguishable on this issue. For example, in *Young v. Brookshire Village Properties,* 101 Ohio App.3d 458, 655 N.E.2d 1329 (1995), the parties had entered into a written contract for the sale of real estate. The purchaser alleged that the closing date had been orally extended and, to support his waiver argument, relied upon the vendor's real estate agent's statement that "he was reasonably certain" that the vendor would agree to postpone the closing date. However, because in that instance there was no written extension which satisfied the statute of frauds, the waiver argument failed. In *Hassel v. Gaydos,* 3 Ohio Law Abs. 43 (1924), an oral modification to an option contract for the sale of land was not enforceable for several reasons, including the lack of evidence regarding consideration for the new agreement.

The general purpose of the statute of frauds is to prevent fraud between the contracting parties. *See e.g., Legros v. Tarr,* 44 Ohio St.3d 1, 8, 540 N.E.2d 257 (1989) (holding that statute of frauds could not be asserted between a party and a stranger to the agreement). With regard to the modification of written contracts, generally, an oral modification of a material term of the original contract is invalid. *Crawford v. Wick,* 18 Ohio St. 190 (1868). In certain instances, however, where the contract as orally modified has been so acted upon, the rights of the parties are generally determined by the modified agreement, with special regard to the facts and circumstances of the particular case.

Nonamaker v. Amos, 73 Ohio St. 163, 76 N.E. 949 (1905). To that end, the appellate court in *Bahner's Auto Parts v. Bahner,* Case No. 97 CA 2538, 1998 WL 470494 **8-9 (1998), found the statute of frauds did not operate to prohibit an oral exercise of a purchase option agreement despite the fact that the contract required the option to be exercised through a writing because in that case the requirement that the intent to exercise be in writing was not a material term of the contract.

In the present action the jury also considered the correspondence of the parties which referenced an ongoing agreement, the non-completion of improvements to the property by Defendants as stated in the written option contract, and the proffer of real estate contracts by Defendants to the Plaintiff. Thus, evidence on the issue of waiver or oral modification, existed to allow the jury to make the factual determination as to the viability of the option contract. On this basis, the Court declines to grant judgment as a matter of law on the issue of the option contract.

C. Punitive Damages

Defendants also request judgment as a matter of law on the issue of punitive damages. They contend that the there was no evidence of evil motive or intent on their part which warranted submission of this issue for the jury's consideration.

The district court's refusal to submit the issue of punitive damages was at issue in *Alexander v. Riga,* 208 F.3d 419 (3d Cir. 2000). In that case, the defendants repeatedly refused to deal with African-Americans regarding rental units

but consistently responded to inquires by interested white parties. The district court found that the Defendants' conduct did not spring from an evil motive or callous indifference and declined to submit the issue of punitive damages to the jury. The appellate court disagreed, noting that it was not the egregiousness of the defendants' conduct but the knowledge that they may have violated federal law. *Id.* at 432. The panel in *Riga* also noted the Supreme Court's view that the "mere existence of a civil rights violation [wa]s not a guarantee of eligibility for punitive damages because a defendant might not be aware of the federal law he or she violated or he or she might have honestly believed that the discrimination was permissible," citing *Kolstad v. American DentalAss 'n,* 527 U.S. 526, 119 S.Ct. 2118, 2125, 144 L.Ed.2d 494 (1999).

In *Kolstad*, the Court discussed the eligibility of punitive damages in a Title VII case. Following a detailed discussion of the terms "malice" and "reckless indifference" relative to its punitive damage discussion, the Court noted that there would "be circumstances where intentional discrimination [would] not give rise to punitive damages liability under this standard." *Id.* 119 S.Ct. at 2125. The Court also declined to equate the definition of reckless indifference or malice to include an "independent 'egregiousness' requirement." *Id.*

Following this line of reasoning, the Eighth Circuit in *Badami v. Flood,* 214 F.3d 994 (8th Cir. 2000), found evidence sufficient to submit to the jury on the issue of punitive damages for violations of the Fair Housing Act. In that case the plaintiffs sought rental housing for their ten member family. The real estate agent contacted located a

property which normally rented to the public for $1,000 with a $600 deposit. However, in the plaintiff's case, he stated that a deposit of $3,000 would be required. The plaintiffs refused to rent the premises with those terms. During trial there was testimony that the rental agent was aware of the Fair Housing Act and its purpose in preventing discrimination based upon familial status. The agent also testified that he discouraged plaintiffs from submitting an application for certain rental properties as he "was certain that the family would not be approved for some rental properties" due to their size. *Id.* at *3. As for the $3,000 security deposit, the agent's business partner testified that it signified additional rent to protect the plaintiffs, if at the conclusion of the lease agreement they were unable to secure additional housing. In reversing the district court's refusal to submit to the jury on the issue of punitive damages the Court agreed that the defendants' conduct was not "egregious per se"; however, it held that a reasonable jury could find the conduct expressed reckless indifference as "their actions might violate a federal statute of which they were aware." *Id.* at *4, citing *Kolstad,* 119 S.Ct. at 2124-25. *See also Tyus v. Urban Search Management,* 102 F.3d 256, 266 (7th Cir. 1996) (where evidence was presented that defendant had knowledge of the law and of its intentional disregard, this was sufficient to allow the issue of punitive damages to be submitted to the jury), *cert. denied,* 520 U.S. 1251, 117 S.Ct. 2409, 138 L.Ed.2d 175 (1997).

Plaintiffs assert that the Defendants were "aware that the fair housing law prohibited [them] from refusing to deal with plaintiff because of the disabilities of the persons who would be residing in Preferred Properties' units." Moreover, because the jury found that the Defendants had intentionally

discriminated, Plaintiff contends that this was sufficient to submit the matter for consideration on punitive damages.

At trial, Defendants presented undisputed evidence that they had been previously engaged in construction specifically designed for a handicapped population. Plaintiffs also introduced evidence that Defendants were aware of housing discrimination laws, (Pltf Ex. 7.), as well as Defendants' dismay that there was such vigorous opposition to handicapped housing in the local community. At trial, Mr. Tillimon testified that he was worried about the difference between subsidized and handicapped housing, as he had been sued by neighbors in a handicapped housing project currently in development elsewhere in the community. The correspondence of May 22, 1999 is illustrative of the Defendants' sentiments:

> Residents of Toledo are just not acceptable to the type of housing Preferred Properties provides. There is strong community opposition and virtually no community support. The courts will not enforce discrimination laws protecting housing for the handicapped and therefore citizens can file suit to stop such projects. The cost of defending such a lawsuit is devestating [sic] to any builder or developer and their subdivisions obtain a stigma making them unmarketable to the ordinary citizen. Perhaps, someday in the future things will be different, but we do not want to pay the price for a social experiment that the community opposes.

The question of whether the Defendants actions, in light of its awareness to the community's opposition to subsidized housing, was discriminatory was answered in the affirmative by the jury. The next question becomes whether Defendants' conduct was sufficient to submit the issue to the jury on the issue of punitive damages. Although the Court indicated that the issue was a close one, based upon the evidence presented a jury could have reasonably concluded that the Defendants' conduct was tantamount to reckless disregard. *See Badami, supra*; *Tyus, supra*. On this basis, Defendants' Motion for Judgment as a Matter of Law is denied.

MOTION FOR A NEW TRIAL

When considering a motion for a new trial where the movant claims that the verdict was against the manifest weight of the evidence, the trial court "must compare and weigh the opposing evidence and it must set aside the verdict if it determines that the verdict is against the clear weight of the evidence." *Clay v. Ford Motor Co.*, 215 F.3d 663, 2000 WL, 834214 *9 (6th Cir. 2000) citing *J.C. Wyckoff& Associates v. Standard Fire Ins. Co.*, 936 F.2d 1474, 1487 (6th Cir. 1991).

Defendants assert that a new trial is justified for four independent reasons; first, the punitive damages verdict was excessive; second, the verdict for the breach of contract action was contrary to law; third, that the verdict as to the discrimination claim was against the manifest weight of the evidence; and fourth, the submission of the Defendants' net worth, prior to a determination of liability, was prejudicial.

With regard to the breach of contract claim, the Court has already determined that this issue was properly submitted to the jury as evidence existed upon which the finder of fact could have believed the parties extended or waived the December 1998 deadline. Therefore, based upon the previous discussion, the Court finds Defendants' motion as to this issue not well taken.

Next, as to the violation of the Fair Housing Act claim, there was clearly sufficient evidence presented upon which a reasonable jury could have found that Defendants discriminated against Plaintiff by refusing to go forward with the sale of property. Defendants raise the question of whether the Plaintiff stood ready and able to proceed with the purchase as there was a lack of evidence that the HUD grant was still available. At trial, however, Plaintiff's director testified that the HUD grant was being held for this project. Thus, this element of the Fair Housing claim was supported by competent evidence and was appropriately submitted to the jury.

Third, Defendants complain that admission of evidence of their net worth prior to a finding of liability was prejudicial as it created sympathy for the Plaintiff. This contention is without merit. "Under federal law, evidence of a defendant's financial worth is traditionally admissible for the purpose of evaluating the amount of punitive damages that should be awarded." *U.S. v. Big D Enterprises, Inc.*, 184 F.3d 924, 932 (8th Cir. 1999), citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981). Additionally, the Court's jury instructions on damages specifically cautioned the panel against awarding damages on the basis of sympathy.

Fourth, Defendants' arguments as to the excessiveness of the punitive damages award will be addressed in tandem with its motion for remittitur. In this case, the jury awarded compensatory damages in the amount of $31,500 and punitive damages of $125,000. The Defendants argue that the amount of punitive damages essentially constituted a windfall in their favor which is an improper basis for allowing such an amount to be awarded. Defendants suggest that the amount of punitive damages awarded was for something other than a penalty.

With regard to the request for remittitur, the trial court may not lower an award unless it is: (1) beyond the range supportable by proof; or (2) so excessive so as to shock the conscience; or (3) the result of a mistake. *Gregory v. Shelby County, Tennessee,* __F.3d__, 2000 WL 986351 *7 (6th Cir. 2000) (citations omitted). With regard to punitive damages in a civil rights action, factors which may be considered by the Court in considering remittitur include the degree of reprehensibility of the conduct, the disparity between the harm or potential harm and the punitive damage award, and the difference between the award and civil penalties authorized or awarded in similar cases. *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). The district court is vested with discretion in ordering a remittitur where it is convinced "the verdict is clearly excessive, resulted from passion, bias or prejudice; or is so excessive or inadequate as to shock the judicial conscience of the court." *Id.* citing *Farber v. Massillon Bd. Of Educ.,* 917 F.2d 1391 (6th Cir. 1990).

Applying this analysis to the this case, reprehensibility is not demonstrated by violence, *see Gregory, supra* at *9,

deceit or even repeated conduct. The evidence supported a finding of violation of the statute, and it was clearly violated on the basis of the *handicapped* status of those prospective tenants for whom Plaintiff represented. In addition, the jury finding that both Defendants acted wantonly or with reckless disregard adds support to a finding of reprehensibility. *See, Riley v. Kurtz,* 194 F.3d 1313, 1999 WL 801560 **8 (6th Cir. 1999) (unpublished) (jury finding of wanton or oppressive conduct suggests a significant punitive award was sustainable).

The ratio of damages in this instance is approximately 4:1. This is nowhere near the impermissible or breathtaking ration of 500:1 as was present in *BMW*, but the Court therein also noted that a punitive damage award of "'more than 4 times the amount of compensatory damages' might be 'close to the line,' it did not 'cross the line into the area of constitutional impropriety.'" *BMW*, 517 U.S. at 582, 116 S.Ct. at 1602, *citing Pacific Mut. Lifelns. Co. v. Haslip,* 499 U.S. at 23-24, 111 S.Ct. at 1046. Based upon the punitive award as compared to the compensatory damages award, it does not approach the "breathtaking" situation as in *BMW*.

As to the third prong, the parties do not address the issue of similar jury verdicts. However, a cursory view of recent punitive damage awards subject to motions for remittitur in Fair Housing Act cases seem to weigh in favor of a decision not to lower the award. *See U.S. v. Big D. Enterprises,* 184 F.3d 924 (8th Cir. 1999) (jury in Fair Housing violation action awarded $1,000 in compensatory damages and $100,000 in punitive damages), *cert. denied,* 120 S.Ct. 1419, 146 L.Ed.2d 311 (2000); *Szwast v. Carlton Apartments,* __F.Supp.2d__, 2000 WL 9604043 (E.D. Mich,

July 10, 2000) (Fair Housing violation wherein district court reduced punitive damage award of $400,000 to $30,000 in light of a $3,000 compensatory award); *Broome v. Biondi,* 17 F.Supp.2d 211 (S.D.N.Y. 1997) (Plaintiffs were awarded compensatory damages of $230,000 and $100,000 respectively with punitive damage awards of $410,000 and $47,000 relative to their Fair Housing Act claims).

Thus, taking all the factors into consideration, keeping in mind the teaching of *BMW* that such a punitive damage award bear a "reasonable relationship" to the compensatory award, the Court finds that the jury's punitive damage award was not excessive. Accordingly, Defendants' motion for remittitur is not well taken.

CONCLUSION

For the reasons stated above, Defendants' Motion for Judgment as a Matter of Law and for a New Trial (Doc. No. 74) is denied. Also pending is Plaintiff's Motions for Permanent Injunction and for Attorney Fees. Defendants requested delaying their response to these respective motions until such time as the Court ruled on the Judgment as a Matter of Law. That ruling now having been rendered, Defendants are granted fourteen (14) days from the date of this Order to submit their response and Plaintiffs are granted fourteen (14) days to reply.

IT IS SO ORDERED.

/s/ _____
DAVID A. KATZ
U.S. DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:99 CV 7342

[Filed March 10, 2000]

PREFERRED PROPERTIES, INC., Plaintiff,	)
v.	)
INDIAN RIVER ESTATES, INC., et al., Defendant.	)

JUDGMENT IN A CIVIL CASE

X **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the plaintiff Preferred Properties, Inc. recover of the defendants Indian River Estates, Inc. and Duane Tillimon the sum of One Hundred Fifty Six Thousand and Five Hundred dollars ($156,500.00), with interest thereon at the rate of 6.197 percent as provided by law, and its costs of action.

IT IS SO ORDERED.

/s/_____
DAVID A. KATZ
UNITED STATES DISTRICT JUDGE

March 10,2000
Date

/s/_____
GERI M. SMITH, Clerk

/s/_____
(By) Deputy Clerk

APPENDIX E

February 29, 2000

(Voir dire began at 9:00 a.m.)

(The following conversation was held at sidebar after the morning recess:)

(10:55 o'clock a.m.)

MR. BRITZ: Before Mr. Barrow comes up, I have a couple matters I would like to address at sidebar.

First of all, I don't know what the purpose is but as I came into the courtroom, there when a whole lineup of people out there in wheelchairs and I don't know if that's orchestrated or what.

THE COURT: Are those witnesses?

MR. DANE: They're people who asked if they could come watch the trial and I said yeah.

THE COURT: Yeah. They can come.

MR. DANE: I didn't orchestrated it, hardly. The Ability Center knows about this case. They're interested in it and they asked can we come and I said well, yeah. I mean --

THE COURT: Well, just so they're not prospective witnesses.

MR. DANE: No. The one gentlemen from the Ability Center, Jim Edtsel, is a prospective witness. He's not here and he's coming later.

THE COURT: Because there will be a separation of witnesses later.

MR. BRITZ: Did the people that are wheelchair bound, did they want to come in here?

MR. DANE: It's an important case for them, Harland. It's a significant case for them.

THE COURT: I mean, if you wish - -

MR. DANE: I don't know what your point is.

THE COURT: I don't think we can highlight the issue by making any statement.

MR. BRITZ: No, I don't think so either. My point was that if the -- if counsel or the plaintiff had orchestrated this and we want wanted to pack the courtroom with handicap people to prejudice the jury, I would object.

THE COURT: That's different. I believe the representations. So do you, I'm sure, Mr. Dane.

MR. DANE: Right. And I have dealt with Mr Edtsel.

I doubt whether Mr. Ellis even knows they're here because as far as I know he's had no conversation with them.

THE COURT: Anything else?

MR. BRITZ: My client feels left out by not being able to participate at this level.

THE COURT: I have never had the client up here.

MR. BRITZ: He wants to note an objection.

THE COURT: Okay.

(Next juror to be questioned approached sidebar.)

THE COURT: Mr. Barrow, I think this is yours.

THE JUROR: Yes.

(Thereupon, voir dire was completed and a jury was sworn. The Court gave preliminary instructions; recess was taken at 12:05 o'clock p.m.)

- - -

(1:25 o'clock p.m.)

(With the jury present, the following proceedings were had:)

THE COURT: Please be seated, everyone. Good afternoon.

MR. BRITZ: Your Honor, the defendant would ask for a separation of witnesses.

THE COURT: There has been a request made and granted under the rules for the separation of witnesses. That means that any individual who is intended to be a witness in this case may not enter the courtroom during a time when it is -- the Court is

* * *

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:99 CV 7342

[Filed January 26, 2000]

PREFERRED PROPERTIES, INC., Plaintiff,

v.

INDIAN RIVER ESTATES, INC., et al., Defendant.

JUDGMENT ENTRY

KATZ, J.

For the reasons stated in the Memorandum Opinion filed contemporaneously with this entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that Plaintiff's Motion for Summary Judgment (Doc. No. 32) is granted as to the counterclaim.

FURTHER ORDERED that Plaintiff's Motion for Partial Summary Judgment (Doc. No. 31) is denied.

/s/_____

DAVID A. KATZ
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:99 CV 7342

[Filed January 26, 2000]

PREFERRED PROPERTIES, INC., Plaintiff,

v.

INDIAN RIVER ESTATES, INC., et al., Defendant.

MEMORANDUM OPINION

KATZ, J.

This matter is before the Court on Plaintiff's Motions for Summary Judgment and Defendants' Opposition thereto. This Court has jurisdiction pursuant to 28 U.S.C. §1331.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Preferred Properties, Inc. ("Preferred Properties") is an Ohio non-profit corporation located in Toledo, Ohio that owns and operates accessible dwellings for disabled persons. Preferred Properties was created in 1992 by the Lucas County Board of Mental Retardation & Developmental Disabilities and the Ability Center of Greater Toledo to ameliorate the lack of accessible housing for

disabled individuals in the greater Toledo area. Lew Ellis ("Ellis") is the executive director or Preferred Properties.

In 1995, Preferred Properties became aware of a desirable site for the construction of handicap accessible housing. This property is located in Point Place at Abygail Trail and David's Creek. Defendant Indian River Estates, Inc. is the entity which develops, markets and sells the residential lots located at Abygail Trail and David's Creek. Duane J. Tillimon ("Tillimon") is the president of Indian River Estates.

On July 25, 1997, Preferred Properties executed an option contract to purchase eight of twenty-three residential lots located in the Point Place location. The option contract referenced eight lots which were non-contiguous.

Once the option contract was executed, Preferred Properties submitted an application to HUD seeking funding to develop the eight lots for disabled housing. The option was to expire on December 30, 1997. In November 1997, Preferred Properties received notification that its application for the funds had been approved and that $1,037,000 had been reserved for the project. Near the end of 1997, Preferred Properties advised Tillimon that the funding for the eight lots in the option contract had been approved by HUD.

In early 1998, Ellis contacted Tillimon and forwarded a check for $8,000.00, which reflected consideration for eight lots referenced in the now expired option contract. Tillimon accepted the check. Due to delays, Tillimon was not in a position to convey fully improved lots to Plaintiff, even at the end of 1998.

When it became apparent that construction on the project would not begin before the spring of 1999, Ellis contacted Tillimon and suggested an updated option agreement as the last one had expired. Tillimon indicated that the lot numbers in the first agreement had changed because of the plat review by the city. In March 1999, Ellis incorporated the new lot numbers into the option agreement and forwarded the agreement to Tillimon.

In response, Tillimon indicated that since all approvals had been received, the parties could proceed directly to executing purchase agreements. Tillimon prepared two purchase agreements, one for the eight lots (for handicapped accessible housing) and the second for purchase of the six alternate lots, which he believed Preferred Properties had agreed to purchase as well.

Ellis then signed the purchase agreement for the eight lots and returned it to Tillimon with a post-it note which requested that Tillimon return an executed copy. The second purchase agreement was not returned or signed by Ellis.

In early May, Ellis received a check from Tillimon in the amount of $8,000.00 - the same amount of earnest money paid in consideration for the original option agreement. In response to a message from Ellis, Tillimon explained in a letter dated May 8, 1999, that he was returning the option consideration as it was clear that Preferred Properties did not wish to purchase the entire block of lots. Following additional correspondence reiterating their respective positions, Preferred Properties initiated this suit against Indian River and Tillimon, alleging violations of the Fair Housing Act, Ohio's discrimination statute, and a breach of contract. Plaintiff

sought injunctive relief regarding transfer of the eight subject lots.

Following a preliminary injunction hearing on July 16, 1999, the Court granted injunctive relief to preclude the Defendants from conveying the eight lots in question pending disposition of the litigation. (Doc. No. 16.) Defendants subsequently asserted a counterclaim alleging that Preferred Properties made false representations that it intended to acquire all fourteen lots, that the Defendants relied upon those representations and that the Defendants are precluded from attempting to market these properties, all to their financial detriment. (Doc. No. 19, ¶¶ 38-41.)

Plaintiff now moves for summary judgment on Defendants counterclaim as well as partial summary judgment on the claims made under the Fair Housing Act and Ohio's statutory discrimination counterpart. The issues having been fully briefed are now ripe for disposition.

MOTION FOR SUMMARY JUDGMENT STANDARD

As an initial matter, the Court sets forth the relative burdens of the parties once a motion for summary judgment is made. Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). Of course, the moving party always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on

file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. 477 U.S. at 323. The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) *(quoting* Fed. R. Civ. P. 56(e)).

Once the burden of production has so shifted, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is not sufficient to "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, Rule 56(e) "requires the nonmoving party to go beyond the [unverified] pleadings" and present some type of evidentiary material in support of its position. *Celotex Corp.*, 477 U.S. at 324. Summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO LIABILITY

In order to establish a violation under the Fair Housing Act, 42 U.S.C. §3601 *et seq.*, the plaintiff must establish: (1) that the defendant was motivated by an intent to discriminate against the handicapped; (2) that the defendant's otherwise neutral action has an unnecessarily discriminatory effect; or (3) failure to provide reasonable accommodation. *See e.g. Gamble v. City of Escondido,* 104 F.3d 300, 304-07 (9th Cir.

1997); *Smith & Lee Associates v. City of Taylor, Mich.*, 102 F.3d 781 (6th Cir. 1996); *Larkin v. State of Michigan Dept. of Soc. Serv.*, 89 F.3d 285, 289 (6th Cir. 1996); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995). The language of the of the Act is "broad and inclusive." *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205,209, 93 S.Ct. 364, 367, 34 L.Ed.2d 415 (1972). *See also Epicenter of Steubenville v. City of Steubenville*, 924 F.Supp. 845, 849 (S.D. Ohio 1996).

A prima facie case of housing discrimination is made by demonstrating that the protected group was subjected to explicitly differential, i.e., discriminatory treatment. It is unnecessary to prove discriminatory intent. *United States v. Lorantffy Care Center*, 999 F.Supp. 1037 (N.D. Ohio 1998); *Thornton v. City of Allegan*, 863 F.Supp. 504 (W.D. Mich. 1993). However, once a *prima facie* case of discrimination is presented, the burden shifts to the defendant to demonstrate that its actions were in furtherance of a legitimate, bona fide interest, and that no alternative would serve that interest with less discriminatory effect. *Thornton*, 863 F.Supp. at 510.

Following the preliminary injunction hearing conducted in mid-1999, this Court concluded that Preferred Properties had established a *prima facie* case sufficient to establish a violation under the FHA. The Court further determined that at the hearing the Defendant had failed to rebut the inference of discrimination. It is on the basis of the Defendants' statements at that hearing and correspondence between the parties that Preferred Properties seeks summary judgment on the liability portion of their suit respective to the claims under the federal and state anti-discrimination statutes. In contrast, the Defendants argue that their motivation behind

the refusal to convey the lots is more complex as they believe that the Plaintiff deceived them and other entities by representing that they were buying all fourteen lots for development.

That the Plaintiff established a *prima facie* case, for the purposes of its right to injunctive relief, does not automatically translate into a finding on the merits in favor of the Plaintiff. Such a conclusion would elevate a preliminary injunction to a hearing on the merits. That was not the case, as the Court only granted preliminary relief. (Doc. No. 16.)

Additionally, the Defendants are entitled to present evidence to establish a nondiscriminatory reason for the refusal to sell. If the Plaintiff demonstrates that the Defendants' conduct was motivated by considerations related to the targeted protected group, then it will prevail. In other words, if the Plaintiff can convince the trier of fact that the Defendants would have acted differently if the purchaser would have not been affiliated with this protected group, then it has established a violation under the FHA. Therefore, both parties should be entitled to present their evidence at trial and have a decision rendered on the merits. Accordingly, Plaintiffs Motion for Partial Summary Judgment is denied.

MOTION FOR SUMMARY JUDGMENT ON DEFENDANTS' COUNTERCLAIM

Defendant Indian Rivers' counterclaim states in pertinent part:

> 38. Defendant further says that Plaintiff represented to the Defendant that it was

purchasing the entire fourteen lots from shortly after the inception of dealings between the parties. The Plaintiff further represented to governmental and financial institutions that it intended to acquire all fourteen lots. The representations made by Plaintiff were false and Defendant relied on said representations in executing the option agreement and the extension of the option agreement.

39. The Plaintiff, for reasons unknown to this Defendant, failed to execute its option by December 30, 1998, causing said option to lapse. Having no legal basis for enforcing any agreement between the parties, the Plaintiff placed the Defendant in a position where it demanded that the Defendant sell the eight lots only or else it would be accused of illegal discriminatory intent.

40. In reliance on the false representations made by the Plaintiff, the Defendant refrained from marketing any portion of the fourteen lots to the public either in bulk or individually, to its damage.

41. The Plaintiff is employing federal anti-discriminatory laws in an effort to correct its own error in failing to exercise the option herein within the option period. Plaintiff has also caused the Defendant to continue paying interest on its loan by causing the Defendant to refrain from selling this property to third

> parties and by failing to purchase all fourteen lots as agreed to by the parties.

(Doc. No. 19.)

To the extent that the counterclaim states a breach of contract, Plaintiff contends that it is prohibited from enforcement under the Statute of Frauds. Next, if the counterclaim states a claim of fraud or fraudulent inducement, statements of future intentions are inadequate to sustain such a claim. The Plaintiff also asserts that as a matter of law there can be no detrimental reliance based upon an option contract.

A. Statute of Frauds

In Ohio, the Statute of Frauds is codified in Ohio Rev. Code §1335.05 which reads in pertinent part:

> No action shall be brought whereby to charge the defendant... upon a contract or sale of lands, tenements, or hereditaments, or interest in or concerning them, or upon an agreement that is not to be performed within year from the making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the person to be charged therewith or some other person thereunto by him or her lawfully authorized.

Preferred Properties contends that it never entered into any written agreement obligating it to purchase the six additional lots. In contrast, Indian Rivers states that there was

various correspondence by Ellis to Tillimon which states, "we are working with Key Bank on the financing for the second phase of our project..." The Defendant also alludes to other correspondence by Plaintiff to KeyBank, HUD and the City of Toledo as further evidence of its intention to purchase all fourteen lots.

Separate signed and unsigned writings may be integrated to satisfy the Statute of Frauds, but only when the writing specifically makes reference to the unsigned writing. *Thayer v. Luce,* 22 Ohio St. 62 (1871). In *Beggin v. Fort Worth Mortgage Corp.,* 93 Ohio App.3d 333, 337, 638 N.E.2d 604, 607 (1994), the appellate court considered three documents which the defendant asserted met the requirements under the Statute of Frauds. The first was a memorandum of lease, the second was a written inquiry as to the commencement of a lease, and the third was a letter to the plaintiff wherein a lease agreement was mentioned. Additionally, the record also contained a lease agreement signed only by the plaintiff. The appellate court concluded that the evidence precluded integration of the signed writings and unsigned lease as there was no specific reference to the unsigned lease.

In the present action, Indian Rivers' reliance upon the February 24, 1998 correspondence makes reference to the "second phase of the project"; however, it does not refer to a specific agreement to purchase the six additional lots. The option contract executed between the parties only references the eight non-contiguous lots and does not address the proposed purchase of any other lots. The other correspondence cited by the Defendant also does not refer to a specific agreement to purchase additional lots. As the

correspondence does not contain specific references to an agreement to purchase additional lots, it does not satisfy the Statute of Frauds under O.R.C. §1335.05. Therefore, Plaintiff's motion for summary judgment on Indian Rivers' counterclaim is granted.

B. Fraud or Fraudulent Inducement

Generally, fraud cannot be predicated on promises or representations relating to future actions or conduct. *Tibbs v. National Homes Constr. Corp.,* 52 Ohio App.2d 281,369 N.E.2d 1218 (1977). However, where representations of future actions are fraudulently made, they are actionable. *Klott v. Associates Real Estate,* 41 Ohio App.2d 118, 332 N.E.2d 690 (1974).

In this case the Defendants have failed to come forth with any evidence to establish the falsity of the representations made by Mr. Ellis. The evidence in the record currently before the Court indicates that Mr. Ellis indicated Plaintiff's interest in acquiring the other six lots for development. The record also reflects that the Plaintiff made attempts to secure financing of that project. The evidence further establishes that this idea was considered but set aside by Plaintiff's Board. However, the Defendant has failed to present any evidence that at the time the representations were made, they were deceitfully made. *See Wall v. Firelands Radiology, Inc.,* 106 Ohio App.3d 313, 666 N.E.2d 235 (1995). Even construing the evidence in the light most favorable to the Defendants, it is clear that Plaintiff is entitled to summary judgment as a matter of law on this issue. Defendants' claim for fraud or fraudulent misrepresentation is without merit.

C. Justifiable Reliance

Under a claim of fraud or fraudulent misrepresentations, reliance on an allegedly fraudulent misrepresentation is justified if representation does not appear unreasonable on its face and if, under circumstances, there is no apparent reason to doubt veracity of the representation. *Togo International v. Mound Steel Corp.*, 106 Ohio App.3d 282, 665 N.E.2d 1160 (1995). Generally such a determination requires evaluation of the circumstances involved, the nature of the transaction, the form and materiality of the representation, as well as the experience of the parties. *Id.*

The facts of this case demonstrate that the Plaintiff was clearly interested in acquiring the eight odd lots as well as the six in-between lots. However, the option agreement entered into between the parties only referenced the eight odd numbered lots and made no mention of the agreement being contingent upon the acquisition of the other lots. The option agreement also expressly provided that the "contract resulting from Seller's acceptance hereof supersedes any and all agreements between the parties hereto regarding the Property which are prior in time to this contract." (Option Contract at ¶ 6.)

The Defendants state that they detrimentally relied upon the representations by installing the sewers at uniform levels and designing lot sizes for narrow buildings with restricted garage space. However, the option contract executed between the parties merely held open the possibility of a purchase, it did not require the purchase of the eight optioned lots. To find otherwise would negate the express purpose of such an agreement and permit justifiable reliance

to be conditioned upon a mere possibility. That position has no basis in law. The Defendants have not presented any evidence to substantiate their claim of justifiable reliance. The Plaintiff did not request or direct the installation of the sewer systems nor did it request design of the lots optioned. Finally, as the Court has determined that the claim of fraudulent misrepresentation is also without a basis in fact, Defendants' claim of justifiable reliance must fail as well.

CONCLUSION

For the reasons stated above, Plaintiffs Motion for Partial Summary Judgment (Doc. No. 32) is denied. Plaintiffs Motion for Summary Judgment as to Defendants' Counterclaim (Doc. No. 31) is granted.

IT IS SO ORDERED.

/s/_____
DAVID A. KATZ
U.S. DISTRICT JUDGE

APPENDIX G

FEDERAL RULES OF CIVIL PROCEDURE
RULE 61

Rule 61. Harmless Error

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.